

To: Fajardo, Juan[Fajardo.Juan@epa.gov]
From: Larry Silver
Sent: Sat 9/24/2016 10:32:08 PM
Subject: RE: Diamond Alkali - Confidential
removed.txt
Draft RD AOC September 21 2016 LSSH Edits 092416.doc

For Settlement Purposes Only

FRE 408 - Offer to Compromise

Confidential

Juan,

Thanks for providing EPA Region 2's draft redlined ASAOC with your email of September 20, 2016, copied in below. We are providing, attached, Oxy's response, accepting into the document EPA's changes and proposing a few additional word changes as outlined below. In addition we have some clarifying questions, stated below, regarding the settlement proceeds sharing proposal described in your email below.

1. para 31 – because the language regarding the New Jersey settlement may mislead the reader into thinking OCC has agreed to global liability at the Site, which it has not, we are proposing that the phrase “Future Cleanup and Removal Costs as defined in the Consent Judgment” be replaced with “certain cleanup and removal costs as stated in the Consent Judgment”.

2. para 70 – we are proposing that the prohibition of dispute resolution for Performance Standards be eliminated.

3. para 82 – we are proposing that a few words be added to clarify that the Work Takeover prepayment of response costs is not a penalty, to ensure that the prepayment may be sought in contribution from other PRPs. Our proposal: “In the event that EPA assumes performance of all or any portion of the Work pursuant to Paragraph 92 (Work Takeover), Settling Party shall be liable for a (i) stipulate penalty in the amount of \$5,000,000, and (ii) a non-penalty prepayment of Future Response Costs in the amount of \$15,000,000.”

4. para 93.d – Oxy outside counsel familiar with potential Tucker Act claims regarding Diamond Shamrock manufacturing at the Lister plant are examining whether there is reason to preserve the Tucker Act language in this paragraph. I was expecting a response by the end of the day yesterday. I will check Monday am and let you know our position.

5. para 97 – I understand that Larry Diamond and Walter Mugdan are discussing whether the exception to the De Micromis Parties’ waiver for dioxin should be expanded to certain other chemicals of concern at the Site. Oxy will reserve its position pending the outcome of those discussions.

6. para 112 – Oxy management is reviewing a proposal that was discussed between Larry Diamond and Walter Mugdan that would provide financial assurance in a liquid form. An Oxy management call is being scheduled early Monday to finalize a position. I expect to get back to you Monday on this.

With regard to the Cash-out Settlement credit proposal in your email below, particularly the phrase in your proposal “The total credit cannot exceed 50% of the total amount billable as Future Response Costs in each billing cycle;”, Oxy requests a clarification that EPA “bank” proceeds and pay them to Oxy in subsequent billing cycles if proceeds exceed 50% of a bill in a particular billing cycle.

As before, please be advised that we are providing these additional comments and edits to the Order subject to Oxy management review and approval and Oxy is reserving all rights in that regard.

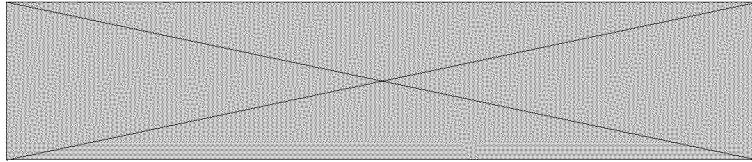
I look forward to talking to you Monday about these proposed changes and the open items identified.

Regards,

Larry

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From: Fajardo, Juan [mailto:Fajardo.Juan@epa.gov]
Sent: Wednesday, September 21, 2016 8:25 PM
To: Larry Silver <lsilver@lssh-law.com>
Subject: Diamond Alkali

Larry,

Attached is a redline/strikeout draft RD AOC. It is consistent with our recent conversations and given our phone call earlier today, I think this draft, absent financial assurance, is what we have agreed to and will not require any further changes.

With respect to Cash-Out Settlement Credit: In a cover letter, we will confirm to OCC that as long as OCC is performing the RD in full compliance with the AOC, it is our intention that 50%* of any cash amounts recovered in bankruptcy or other cash-out settlements for OU2 of the Diamond Alkali Site would be applied as a credit against Future Response Costs as that term is defined in the AOC. The credit arises with respect to any such cash-out settlement payments received by EPA after the Effective Date of the AOC, and up to and including the time that EPA issues the final bill for Future Response Costs under the AOC. The total credit cannot exceed

50% of the total amount billable as Future Response Costs in each billing cycle; provided however that Future Response Costs incurred by EPA as a result of Work Takeover (see Paragraphs 67, 82 and 116 of the draft AOC) are not subject to any reduction as a result of the cash-out settlement credit.

*The other 50% of any settlement amounts would be applied to reduce the total liability of parties other than the bankrupt or cash out parties (i.e., reduce EPA's total amount of unreimbursed costs for the Site).

I'll ask Alice Yeh to forward the SOW to you, Michael Anderson and Juan tomorrow morning.

Finally, I understand that Walter Mugdan and Larry Diamond spoke today and are working to resolve the financial assurance issue. I expect that they will be able to reach an agreement acceptable to both the Agency and Oxy. I do, however, think that there is a misunderstanding. It appears that Larry is under the impression that the Oxy Board was never informed that EPA was seeking at least some portion of the financial assurance to be liquid. I assume that Larry is not up to date on all the conversations that have taken place and may not have seen you September 13 email:

d. Financial Assurance – we are evaluating EPA's proposal on Friday that OCC provide financial assurance of \$82.5 million, composed of a corporate guarantee and liquid amount. We will get back to you by the end of this week with a response. We have not yet made any changes to the FA section of the ASAOC from the last draft.

I know that we both look forward to reaching an agreement under which Oxy will perform the OU2 remedial design.

Sincerely,

Juan M. Fajardo

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